

Darden Restaurants, Inc., d/b/a the Olive Garden and Kelly Sondeno. Case 27–CA–14737

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 9, 1997, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Darden Restaurants, Inc., d/b/a the Olive Garden, Billings, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's determination that Koch's instructions to supervisors to investigate and report union activity did not violate the Act.

² The Respondent has excepted, *inter alia*, to the portion of the judge's recommended Order directing the Respondent to post copies of the notice at its Utah and Idaho restaurants, as well as at its Billings, Montana restaurant. We find that the General Counsel has not produced sufficient evidence to show that the unfair labor practices at the Billings facility were part of an established company policy or that employees at others of the Respondent's facilities were likely to become aware of them. Consequently, we find it unnecessary to require the Respondent to post notices of its compliance with the Board's Order at any facility other than its Billings restaurant. *Control Services*, 314 NLRB 421, 421–422 (1994). Compare *Beverly Enterprises*, 310 NLRB 222 (1993), *enf. denied* in relevant part 17 F.3d 580 (2d Cir. 1994) (corporatewide posting required where broad pattern of violations directed by central management); *Albertson's Inc.*, 307 NLRB 787, 788–889 (1992), *enf. denied* 8 F.3d 20 (5th Cir. 1993) (where similar violations occurred during contemporaneous organizing drive of union at two stores, posting of notice covering all violations ordered at both stores given likelihood of employee awareness of all violations); *Postal Service*, 303 NLRB 463 (1991), *enfd.* 969 F.2d 1064 (D.C. Cir. 1992) (employerwide posting ordered in case finding unlawful policy enforced at one location because it was demonstrably an employerwide policy). We shall also modify the judge's recommended Order to conform with the violations found.

Member Hurtgen agrees that the Respondent's obligation to post a notice should be limited to its Billings restaurant. He agrees that the cases cited above are distinguishable. Accordingly, he does not pass on the propriety of the order in those cases.

1. Substitute the following for paragraph 1(b):

“(b) Threatening employees that it was the Respondent's policy not to tolerate union activity in any of its restaurants and that the Respondent will close any restaurant and fire all employees where union activity occurs.”

2. Delete paragraph 1(c) and reletter the subsequent paragraph.

3. Substitute the following for paragraph 2(a):

“(a) Within 14 days after service by the Region, post at its restaurant in Billings, Montana copies of the attached notice marked ‘Appendix.’³ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 24, 1996. *Excel Corp.*, 325 NLRB 17 (1997).”

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union activities.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

WE WILL NOT threaten employees that we will not tolerate any union activity and that we will close any restaurant and fire all the employees where union activity occurs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DARDEN RESTAURANTS, INC. D/B/A THE OLIVE GARDEN

Andrea Kemp Floyd, Esq., for the General Counsel.

Keith A. Warren, Esq., for the Respondent.

DECISION

Introduction

ALBERT A. METZ, Administrative Law Judge. This case was heard at Billings, Montana, on August 8, 1997.¹ Kelly Sondeno, an individual, has charged that Darden Restaurants, Inc., d/b/a the Olive Garden (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following findings of fact. The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I. BACKGROUND

The Respondent operates restaurants throughout the country. One of Respondent's divisions operates a restaurant in Billings, Montana, one in Boise, Idaho, and five in Utah. At the relevant time this division was headed by Director of Operations John Koch. The Billings restaurant supervisory hierarchy consisted of General Manager Myron Manthe and Assistant Managers Jim Anderson, John Beckner, Vicki Damson, and Kathy Ywras.

II. MARCH 24 MANAGERS' MEETINGS

On March 24 Koch held a managers' meeting at the Billings location. All managers except Ywras were in attendance. According to Koch he had a checklist of items that he went over during the meeting. One topic of discussion concerned unions. Koch told the managers that the AFL-CIO was commencing a nationwide organizational drive that might include restaurants. It was brought to Koch's attention that Billings employee Kelly Sondeno was an active union supporter for the Hotel and Restaurant Employees Union during an organizational campaign at a Holiday Inn where she also worked. Koch told the managers he would be interested in knowing the level of union activity in Billings. He also cautioned them against discussing the matter with Sondeno. Koch remembered a manager asking if the restaurant would close if a union organized the employees. Koch testified he told the managers it would not.

Assistant Manager Jim Anderson testified Koch told the group that he would close the restaurant if it was organized by a union. Koch said they should investigate any union activity in the restaurant and report anything they learned to General Manager Manthe. Anderson denied that Koch had said not to speak to anybody else about union activity.

Assistant Manager John Beckner recalled Koch asked if the managers knew of anyone involved with a union and they told him about Sondeno's union activities. He recalled that Koch was "dumbfounded" to learn of Sondeno's union activism. Koch said that they needed to know if there was any chance of a union coming in the restaurant. Beckner testified the managers were instructed by Koch to report any findings to Manthe. Beckner testified he asked what the management would do if a union came into the restaurant. Koch replied that before they would let a union come in they would close the store. The two remaining managers in attendance at the meeting, Manthe and Damson, did not testify at the hearing.

III. MANAGERS' CONVERSATIONS WITH SONDENO

A. Anderson

On March 24, shortly after the managers' meeting, Anderson had a conversation with Sondeno. According to Sondeno, Anderson asked her if she still had anything to do with unions in Billings. She told him she was participating in a get out the vote campaign and a minimum wage proposal. Anderson said that in the managers' meeting they had been told that the AFL-CIO's John Sweeney had an election year campaign to do more organizing. Anderson said that it was the Respondent's policy not to tolerate any type of union activity in any of their restaurants. Anderson added that if a restaurant were organized or had the threat of being organized, they would close it down and fire the employees. He told Sondeno he did not want to lose his job.

Anderson testified that he asked Sondeno if she was still active in organizing at the Holiday Inn. He also asked her if Koch could close down the restaurant in the event of union organizing. Sondeno told him that he could not. Considering the demeanor of the witnesses and the greater detail of Sondeno's testimony, I credit her recollection of what was said in the conversation.

B. Beckner

Later on March 24 Beckner had a conversation with Sondeno. Beckner inquired if Sondeno was still active in organizing at the Holiday Inn. She told him she was not but was working on a get out the vote campaign and minimum wage matters on behalf of unions. According to Sondeno, Beckner asked her if she thought there were any other of the Respondent's employees involved with union activity. She told him she did not think so. Where there are discrepancies between Beckner and Sondeno as to what was said during this conversation, I credit Sondeno on demeanor grounds.

C. Discharge of Managers

A few days after the above conversations, Sondeno was in Manthe's office discussing an unrelated matter. At the meeting's conclusion she mentioned being interrogated by Anderson and Beckner concerning her union activity. On April 4 Koch and Manthe met separately with Anderson and Beckner. Koch discharged both of them, allegedly for insubordination because they had not followed his orders to refrain from questioning Sondeno about her union activities.

In his meeting with Koch, Anderson admitted questioning Sondeno but denied threatening closure of the restaurant. As part of his Montana unemployment claim, Anderson filed a statement which contained a reference to the restaurant closing allegation. Anderson denied that he told an employee that General Mills (apparently Respondent's parent company) would

¹ All dates refer to 1996 unless otherwise stated.

close the restaurant if it were organized by a union. "I had no reason to tell this employee that General Mills would close down the restaurant because we were told during the meeting that General Mills would always remain open during a threat of union organization." (R. Exh. 1.) Considering the demeanor of the witnesses, Anderson's confused testimonial explanation of his unemployment declaration, and the record as a whole, I do not credit Anderson's unemployment statement as being accurate. Koch also testified that both Beckner and Anderson admitted that he had said in the March 24 meeting they were not to question Sondeno concerning union activity. Neither Anderson nor Beckner conceded that Koch instructed them not to question employees. Beckner reiterated to Koch that he had merely told the managers to investigate union activity and report the results to Manthe. Manthe, who was present during both the Anderson and Beckner discharge interviews, did not testify.

IV. ANALYSIS

A. Threat to Close

In deciding whether Koch threatened to close the restaurant, I find the demeanor of Anderson and Beckner were more persuasive than Koch's I have already found above that shortly after the meeting Anderson conveyed the closure threat to Sondeno. In addition, Koch was not corroborated in his denial by other of Respondent's managers. Neither Manthe nor Damson, both of whom were present at the March 24 meeting, were called by the Respondent to testify as to what Koch said. Their absence was not explained. Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure may give rise to an inference that the evidence is unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an inference is appropriate in this case. I find that had Manthe and Damson testified their testimony would have been contrary to Koch's denial that he threatened to close the Billings restaurant. *International Automated Machines*, 285 NLRB 1122-1123 (1987). Considering the demeanor of the witnesses, the weight of the evidence and the adverse inference, I find that Koch did threaten that if a union came into a restaurant the Respondent would close that location.

B. Instructions to Investigate Union Activity

The Government alleges that the Respondent violated the Act when Koch instructed managers to investigate and report union activity. No witness testified that more was said in this regard. The managers did unlawfully implement those instructions by interrogating Sondeno and a remedy is provided below for that action. However, an employer is not precluded from gaining knowledge of union activity at its business. I find that Koch's general instructions to supervisors concerning investigation of union activity did not violate the Act.

C. Statements to Sondeno

The Board has stated that the interrogation of an open and active union supporter violates Section 8(a)(1) of the Act when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

While Sondeno was a union activist none of that activity involved the Respondent. Anderson's admitted interrogation of

Sondeno was accompanied by the threats that it was Respondent's policy not to tolerate union activity in any of their restaurants, the restaurant would be closed and the employees fired if a union represented the employees. Such threats are clearly coercive. Likewise, Beckner's interrogation of Sondeno concerning employees' union activities, particularly in the context of the earlier Anderson interrogation and threats, is also coercive. I find that the two interrogations and Anderson's threatening statements are violations of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Darden Restaurants, Inc., d/b/a the Olive Garden, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has violated Section 8(a)(1) of the Act.

3. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

The Government seeks a notice posting at all seven of the Respondent's restaurants that were under Koch's supervision. Koch was the Respondent's spokesman for his three state division. The threat made by Anderson to Sondeno announced Respondent's zero tolerance for union organizing as well as the consequence of closure of the restaurant if organizing occurred. The publication of this policy regarding Koch's division is a serious threat to employees rights protected by the Act. In light of the policy announcement by Koch that was conveyed to Sondeno, I shall recommend the posting of notices in all seven restaurants composing Koch's division.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²

ORDER

The Respondent, Darden Restaurants, Inc., d/b/a the Olive Garden, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Threatening employees that the Respondent will not tolerate union activity, and will close any restaurant and fire all employees where union activity occurs.

(c) Maintaining an announced policy of closing restaurants where union activity occurs.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its division restaurants that were under the supervision of John Koch

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in Montana, Idaho, and Utah copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 24, 1996. *Excel Corp.*, 325 NLRB 17 (1997).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.